The Breve Testatum and Craig's Ius Feudale

THE *BREVE TESTATUM* AND CRAIG'S *JUS FEUDALE*

by

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Thomas Craig of Riccarton had practised law in Scotland for nearly forty years before, around 1600, he started to write his masterpiece, *Jus Feudale*[1]. It contains many allusions to legal practice, and is always informed by his observations of the proceedings of the Scottish courts[2]. Who could seriously doubt that

1. *Jus Feudale, Tribus Libris Comprehensum. Quibus Non solum Consuetudines Feudales & Praediorum Iura, quae in Scotia, Anglia, & plerisque Galliae locis obtinent, continentur; Sed Universum Ius Scoticum, Et omnes fere Materiae Iuris clare & dilucide exponuntur, Et ad fontes Iuris Feudalis & Civilis singula reducuntur. Authore Clarissimo & Doctissimo Viro Mro Thoma Cragio De Riccartoun, In Senatu Edinburgensi Patrono Celeberrimo & Iurisconsultissimo* (London and Edinburgh 1655); *Thomae Craigii de Riccartoun, in Senatu Edenburgensi Patroni & Jure Consultissimi, Jus Feudale, Tribus Libris Comprehensum, Quod, Praeter Jus Commune Longobardicum Feudales Angliae Scotiaeque Consuetudines complectitur; Opus in Germania Dudum Desideratum. Accessit huic Editioni Summaria Terminorum Peregrinorum Explicatio Alphabetico Ordine digesta, Cum Praefatione Lüderi Menckenii, I Cti.* (Leipzig 1716); *D. Thomae Cragii de Riccarton, Equitis, in Senatu Edinburgensi Patroni celeberrimi & jurisconsultissimi, Jus Feudale, Tribus Libris comprehensum: Quibus non solum consuetudines Feudales, & Praediorum jura, quae in Scotia, Anglia, & plerisque Galliae locis obtinent, continentur; sed universum jus Scoticum, & omnes fere materiae juris clare & dilucide exponuntur, & ad fontes juris Feudalis & Civilis singula reducuntur. Editio Tertia, prioribus multo emendatior . . . Opera & studio Jacobi Baillie Advocati* (Edinburgh 1732); *The Jus Feudale by Sir Thomas Craig of Riccarton with an Appendix Containing the Books of the Feus,* 2 vols. trans. by James Avon [Lord] Clyde (Edinburgh 1934) (hereafter cited as Clyde, trans. *Jus Feudale*). All references hereafter will be to the 3rd ed. by Baillie (cited, except for introductory matter, by book, title, and paragraph number) as Baillie made a careful collation of the text with the MSS (none of them an original MS). I have compared all the texts quoted with the 1655 edition and noted some trivial differences, other than those of orthography, paragraphing, and punctuation. All translations are my own unless otherwise noted. For a translation of the full title, see text at note 31 *infra*. A proper scholarly bibliography of Craig is much wanted. See the dedication to King James VI (*Jus Feudale*, p.vi) for his claim to have started work after 40 years of practice. On the date of writing, see text and note at note 36 *infra*.

2. There is little point in rehearsing here the many instances in which Craig refers to his own knowledge of practice; but I shall pick out a few. See *Jus Feudale*, 1.10.11; 1.12.38; 2.1.3; 2.1.26. He often cites cases generally by writing *vidi* or, occasionally, *memini*, before going on to give an account of a decision, see, e.g., *Jus Feudale*, 1.11.17 and 2.3.24. On the first of these, see also *Acts of the Parliaments of Scotland, 1124 – 1707*, 12 vols. ed. T. Thomson and C. Innes (Edinburgh 1814 – 75), Vol. 3, p. 214, c.9 (1581) (hereafter cited as *A.P.S.*). D.M. Walker, *The Scottish Jurists* (Edinburgh 1985), at p. 59 writes: 'Only to a small extent does Craig cite Scots . . . decisions'; and at p. 61: 'Craig himself gave hardly any references to decided cases'. This is incorrect. Craig cites nearly ninety cases by name and a great many more in general terms. He was very alive to the importance of the practice of the Lords of Session: see, e.g., *Jus Feudale*, 1.15.20. This is what one would expect of a successful advocate. Craig's success is suggested by his appearance before Parliament on behalf of the widow and daughter of the Regent Moray (*A.P.S.*, Vol. 3, p. 85 (1574)). He

Craig was learned in the laws of his own country? This must answer to some extent the scathing, if essentially trivial, attack made on him by Walter Ross, obviously a master of sarcastic invective[3]. In contrast, Craig's contemporaries and near-contemporaries had no doubt of the merits and usefulness of *Jus Feudale*, which circulated in manuscript before being posthumously printed in 1655. Thus, less than three weeks after his death, the Privy Council wrote to the King in April, 1608, requesting he remember with liberality Craig's widow and children, because the 'sundrie volumis', including those 'de feudis', written by Craig added to the royal honour, were a credit to Scotland, and helped instruct in 'Lawis' the King's Scottish subjects. The Council further recommended the publication of Craig's work[4]. Two years later, in another letter to the King, the Privy Council again generally recommended the publication of Craig's manuscripts under royal patronage, once more specially singling out *Jus Feudale* ('de Feudis')[5] – a recommendation repeated by the Estates in 1612, though without particular mention of the *Jus Feudale*[6]. In 1633, Robert Craig, the son of the author, and the College of Justice petitioned the Estates about *Jus Feudale*: the Estates ordered the printing of the book, appointed a committee of distinguished lawyers to examine it, and granted Craig an exclusive privilege in it for twenty-one years[7]. Despite the seemingly late date of the printing of *Jus Feudale*[8], it was the first comprehensive treatise on early modern Scots law to be published.

Though Stair considered Craig's work as learned, he pointed out that subsequent legislation and court decisions had rendered it in many ways out of date[9].

also regularly appeared as a procurator or prolocutor, and sometimes on his own behalf, before the Privy Council. (*Register of the Privy Council of Scotland*, first series, 1545 – 1625, 14 vols. ed. by J.H. Burton, *et. al.* (Edinburgh, 1877 – 98), Vols. 2-7 *passim* (hereafter cited as *R.P.C.*) See also note 90 *infra*.

3. See W. Ross, *Lectures on the History and Practice of the Law of Scotland, Relative to Conveyancing and Legal Diligence* (2nd. ed. Edinburgh 1822), Vol. 2, p. 7: 'Sir Thomas Craig ... can scarcely bring himself to confess that we ever had any municipal law or custom, peculiar to ourselves ...'. *Ibid.*, Vol. 2, p. 9: 'Sir Thomas Craig himself studied only the languages and philosophy in Scotland; for the laws he went to France; and having there completed his studies, he, ... without any domestic preparation, entered a pleader before the Lords. So little attention does this great man seem to have paid to his own country, that he does not even know, that both the civil and canon laws had, long before his time, been publicly taught in Scotland'.

4. National Library of Scotland (Denmilne MSS.) Adv. MS. 33.1.1, Vol. 2, f.116r (no. 59). This letter is dated 14 April 1608. Craig had died on 26 February 1608, see P.F. Tytler, *An Account of the Life and Writings of Sir Thomas Craig of Riccarton, Including Biographical Sketches of the Most Eminent Legal Characters, Since the Institution of the Court of Session by James V, Till the Period of the Union of the Crowns* (Edinburgh 1823), p. 313.

5. *R.P.C.* (first series), Vol. 9, p. 572.

6. *A.P.S.*, Vol. 4, p. 523, c. 75 (1612).

7. *A.P.S.* Vol. 5, p. 57, c. 47 (1633). The committee appointed consisted of Sir Thomas Hope, Lord Advocate, Sir Alexander Gibson of Durie, Sir Alexander Fletcher of Innerpeffray, both Senators, and Mr. Lewis Stewart, advocate.

8. See note 1 *supra*.

9. J. Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland, Deduced from its Originals, and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations* (Edinburgh and Glasgow 1981 based on 1693 ed.), 2.3.3.

Nonetheless in 1703 James Gatherer could still sensibly write: '[E]ven the greatest Masters in your Noble Science, and the Honourable and Grave Senators of the College of Justice, do not think it beneath them to appeal to that Oracle of the *Feudal Law*'[10].

In 1736 the Faculty of Advocates paid £30 to James Baillie, editor of the authoritative 1732 edition, because he had 'been brought under some straits in his circumstances' because of 'the great charges he has been at in publishing a handsome and correct edition of the famous Sir Thomas Craig's book *de feudis*'. It was further 'warmly recommended' to members of the Faculty that they purchase a copy because 'the original book itself was one of the prime standard Books of the Scottish Law'[11].

Despite Ross's cavils, Craig has been recognised by modern historians as a seminal writer on the legal history not only of Scotland, but also of Europe. Professor J.G.A. Pocock considered him capable of 'highly intelligent and indeed brilliant conjecture', and described him as having 'energy and resource as a historian'[12]. Dr. J. Wormald has recently suggested that Craig was the first to put forward the idea of 'bastard feudalism'[13].

Since Craig wrote at the infancy of the modern historical discipline, we should be ready to concede the possibility that he made mistakes[14]. One which he allegedly made is of thinking that in Scotland there had been at one time a special type of deed called a *breve testatum* which provided evidence that a grant of land had previously taken place. That no such deed had ever existed in Scotland was pointed out in 1857 by William Rodger[15]. In a paper published in 1974, Mr. J.J. Robertson claimed Craig as the first to have stated that the *breve testatum* had existed in Scotland as the forerunner of the later charter. He argued that Craig had assumed the *breve testatum* had necessarily existed in Scotland because it had existed in Lombardy[16]. The allegation that Craig gave a mistaken account of the development of Scots law is important, not only because it affects our understanding of his scholarly abilities, but also because *Jus Feudale* still retains some measure (if perhaps now slight) of authoritative status[17]. Scots lawyers

10. See T. Craig, *The Right of Succession to the Kingdom of England*, trans. J. Gatherer (London 1703) unpaginated dedication (by Gatherer). On this work of Craig's, see further note 23 *infra*.

11. *The Minute Book of the Faculty of Advocates*, ed. J.M. Pinkerton (Stair Society, Vols. 29 and 32, Edinburgh 1976 and 1980), Vol. 2, p. 156.

12. J.G.A. Pocock, *The Ancient Constitution and the Feudal Law, A Study of English Historical Thought in the Seventeenth Century* (Cambridge 1957, reissue 1987), pp. 81 and 86.

13. J. Wormald, *Lords and Men in Scotland, Bonds of Manrent, 1442 – 1603* (Edinburgh 1985), pp. 11-12.

14. See, e.g., Craig, *Jus Feudale*, 2.2.18, where he says that the office of Chancery came to Scotland on James I's return from captivity in England, and 1.8.1-3 on the date of the establishment of feudalism in Scotland; but see 2.20.3-4 and 2.20.30 for good examples of Craig's historical sensitivity.

15. W. Rodger, *The Feudal Forms of Scotland Viewed Historically, Since the First Appearance of Written Titles to Lands in that Part of Great Britain* (Edinburgh 1857), pp. 53-54.

16. J.J. Robertson, *The Illusory 'Breve Testatum'*, in The Scottish Tradition, Essays in honour of Ronald Gordon Cant, ed. G.W.S. Barrow (Edinburgh 1974), pp. 84-90.

17. Walker, *The Scottish Jurists*, p. 64 writes: 'It is still a standard authority on the feudal system of his time, and Craig has generally been deemed the earliest of our institu-

would be shown to be placing (and, more importantly, to have placed at crucial times in the development of Scots law) trust in a work potentially unreliable.

Craig modestly assured critics that: '[I]f they shall have set their mind to the great study of correcting our errors, I shall not be angry even at that, but I strongly pray and supplicate, by the utility of our common native land and the public good, that they bring forward these errors into the light as soon as possible, on account of the utility and dignity of our common native land, and I shall feel the greatest possible gratitude as much in my name as that of our native land'[18].

I shall argue here that Robertson's claim to have brought such an error forward into the light is mistaken. The argument will be presented in three parts. In the first, I shall briefly discuss Craig's career and his purpose in writing *Jus Feudale* for the evidence they give on the nature of the work. This will lead to the second where, against this background, I shall assess Robertson's argument by examining and discussing all the instances where Craig discusses the *breve testatum*. In the third, and concluding section, I shall argue that Craig did not make the suggested mistake – as his account of the history of charters confirms, show how his account of the *breve testatum* relates to that of other authors, and suggest a more likely source for the historical error pointed out by Rodger.

I

The only full-length biography of Craig is that by Tytler published in 1823, which is notable for the extent to which Craig's contemporaries are covered to eke out the meagre information about the man himself[19]. Though his importance in the history of Scots law is unquestioned, his life has remained largely obscure, despite there being obvious materials to use towards a reconstruction of at least his career[20]. Though Craig did hold a number of appointments, his career appears to have been one more of a busy and successful lawyer than of a man of public affairs[21]. The only great public undertaking in which he certainly was involved was the union negotiations of the early seventeenth century,

tional writers, whose work is considered of authority equivalent to that of a bench of judges'. For a criticism of this notion of 'institutional writing', see J.W. Cairns, *Institutional Writings in Scotland Reconsidered*, in New Perspectives in Scottish Legal History, ed. A. Kiralfy and H.L. MacQueen (London 1984), pp. 76-117, and 'Book Review', Northern Ireland Legal Quarterly, 37 (1986), pp. 404-407.

18. Craig, *Jus Feudale*, p. viii: 'si nostra errata corrigendi tantum studium in animum induxerint, ne illud quidem indignabor, sed ob patriae communis utilitatem et dignitatem, ut ea quamprimum in lucem producant, per communis patriae utilitatem et commoda publica vehementer oro et obstestor, gratiasque quam maximas tam meo quam patriae nomine habebo'.

19. Tytler, *An Account of the Life and Writings of Sir Thomas Craig of Riccarton*; see note 4 *supra* for full title.

20. Walker, *Scottish Jurists*, p. 54 has made some use of them; but further study of, e.g., the *Registrum Magni Sigilli*, 11 vols., ed. J.M. Thomson *et.al.* (Edinburgh 1882–1914), *R.P.C.*, and the *Registrum Secreti Sigilli*, 8 vols., ed. M. Livingstone *et al.* (Edinburgh 1908–82) would clearly be worthwhile. Craig's fondness for anecdotes could also be exploited.

21. See, e.g., Walker, *Scottish Jurists*, p. 54.

after James VI's succession to the English throne[22]. The prospect of a union may have given an added impetus to his scholarly work[23].

22. *A.P.S.*, Vol. 4, pp. 263-4, c.1 (1604) and see, e.g., B.P. Levack, *The Proposed Union of English Law and Scots Law in the Seventeenth Century*, Juridical Review (1975), pp. 97-115; *Toward a More Perfect Union, England, Scotland and the Constitution*, in After the Reformation, Essays in Honor of J.H. Hexter, ed. B. C. Malament (Manchester 1980), pp. 57-74; *English Law, Scots Law and the Union, 1603 – 1707*, in Law Making and Law Makers in British History, ed. A. Harding (Royal Historical Society, Vol. 22, London 1980), pp. 105-119, and now, above all, his *The Formation of the British State: England, Scotland, and the Union, 1603 – 1707* (Oxford 1987), pp. 68-101; E.J. Cowan, *The Union of the Crowns and the Crisis of the Constitution in 17th Century Scotland*, in The Satellite State in the 17th and 18th Centuries, ed. S. Dyrvik, K. Mykland and J. Oldervoll (Bergen, Oslo and Tromsø 1979), pp. 121-40; T.B. Smith, *British Justice A Jacobean Phantasma*, Scots Law Times (News) (1982), pp. 157-64; *The Jacobean Union, Six Tracts of 1604*, ed. B.R. Galloway and B.P. Levack (Scottish History Society, Fourth Series, Vol. 21, Edinburgh 1985); and B.R. Galloway, *The Union of England and Scotland, 1603 – 1608* (Edinburgh 1986).

23. In the dedication of the *Jus Feudale* to King James VI, Craig, at p. vi, indicated that the prospect of the Union was at least part of the reason behind his work, but see further, text *infra*, at notes 31-43. The *De Unione Regnorum Britanniae Tractatus*, trans. C. Sanford Terry (Scottish History Society, Vol. 60, Edinburgh 1909) of 1605 was evidently promoted by the prospect of a union. Craig's two other major works are: first, Edinburgh University Library, MS. Dc.3.48, *De Jure Successionis Regni Angliae, Libri Duo. Adversus Sophismata Cujusdam Personati Dolomanni, Quibus Non Solum Jura successionis in regnis, sed etiam ipsorum regum sacrosanctam authoritatem nititur evertere* (dated, at p. 661, 29 December, 1602) published as *The Right of Succession to the Kingdom of England, in Two Books, Against the Sophisms of Parsons the Jesuite, Who assum'd the Counterfeit Name of Doleman; By which he endeavours to overthrow not only the Rights of Succession in Kingdoms, but also the Sacred Authority of Kings themselves*, trans. J. Gatherer (London 1703). At the end of the (unpaginated) preface, Gatherer states that he used the MS. in the library of the College of Edinburgh: obviously MS. Dc.3.48 *supra* which was in the University Library by the late seventeenth century. He also describes as 'good' the copy in the Advocates Library (presumably National Library of Scotland, Adv. MS. 24.1.1). The second work is, National Library of Scotland, Adv. MS. 16.2.25, *De Hominio disputatio adversus eos qui Scotiam feudum ligium Angliae, Regemque Scotorum eo nomine hominium Anglo debere asserunt* (dated, at p. 271, 6 March, 1602) published as: *Scotland's Soveraignty Asserted, Being a Dispute concerning Homage, against those who maintain that Scotland is a Feu, or Fee-Liege of England, and that therefore the King of Scots owes Homage to the King of England*, trans. G. Ridpath (London 1695). Ridpath states, at p. xxxvii, that he is using a different MS. from that 'in the Lawyers Library at Edinburgh' (presumably National Library of Scotland, Adv. MS. 24.1.2). The printed sheet, *Proposals for Printing the Translation of a Latin Manuscript, written by Judge Craig ... Entituled De Hominio* (London 1695?) indicates that Ridpath used Adv. MS. 16.2.25, which is there described as 'being Writ with more than ordinary Care and Curiosity'. These two works, while not reflecting directly the prospects of an incorporating union, nonetheless reflect Scotland's relations with England and James VI's future inheritance of the English throne. The 1602 MSS. were copied by Charles Lumsden, Minister of Duddingston, who also copied National Library of Scotland, Adv. MSS. 7.1.10 and 25.5.8. I am grateful for the assistance of Miss M.H. Robertson of Edinburgh University Library in this identification. For a general account of the intellectual background against which Craig wrote, see now A.H. Williamson, *Scottish National Consciousness in the Age of James VI, The Apocalypse, the Union and the Shaping of Scotland's Public Culture* (Edinburgh 1979). Craig possibly may also have written a book entitled *De Scotorum Origine* – an intriguing title – now apparently lost: see D. Irving, *Lives of Scotish* [sic] *Writers* (Edinburgh 1839), Vol. 1, p. 158. National Library of Scotland, Adv. MS. 25.4.1, ff. 261-91 (*Tractatus in libros de feudis*) is attributed to Craig by the catalogue. To be confirmed, this would require further study.

One of the unfortunate gaps in our knowledge of Craig's life is our ignorance of where he studied law and under which professors. From the evidence of his writings, we know he studied in Paris, as in his *De Unione* he writes *ut ipse vidi cum adolescens Lutetiae essem* (he is talking of the mutual support Scots and English might give each other when abroad)[24]. We should not conclude, however, that he there studied law, because manuscripts of *De Jure Successionis* report him as writing: *Et cum adolescens Lutetiae literis operam darem*[25], and *cum Lutetiae adolescens operam literis darem*[26]. This strongly suggests he there exclusively studied arts. (Gatherer's translation does not properly represent this)[27]. The late Mr. David Baird Smith was surely correct, however, in stating of Craig's years in France that: '[T]he influences which he experienced there were permanent and formative. He received an imprint which defined him as a man no less than as a jurist. In particular he owed much to the spirit of the French legal practitioners of his age'[28]. When, some forty years after leaving France, Craig came to write *Jus Feudale*, he obviously turned to the work of French scholars, and his text contains many references to the leading humanist jurists of the sixteenth century[29]. Craig makes clear his intellectual mentors, though not uncritical of them[30].

Appreciation of this French, humanist influence is vital in interpreting and understanding *Jus Feudale*. It explains the comparative and historical aspects of the treatise, evident from its full title, which translates as:

> The Feudal Law, set out in Three Books: in which are contained not only the Feudal customs and rights over land which obtain in Scotland, England, and most localities in France; but the general Scots law, and nearly all subjects of law are clearly and distinctly set out, and separately traced back to the founts of the Feudal and Civil Law.[31]

24. Craig, *De Unione*, p. 161 (trans. by Sanford Terry, *ibid.*, p. 419 as: 'as I noticed when I was a lad in Paris').

25. Edinburgh University Library, MS. Dc. 3.48, p. 38; see also National Library of Scotland, Adv. MS. 24.1.1, p. 33.

26. Edinburgh University Library, MS. Dc. 3.48, p. 81; see also National Library of Scotland, Adv. MS. 24.1.1, p. 66 (which reverses *literis* and *operam*).

27. Craig, *The Right of Succession*, trans. Gatherer, at p. 22: 'I remember to have heard this Question much toss'd and disputed at *Paris*, when I was a Student there'; and at p. 49: 'When I was a Student at *Paris*'. Tytler's speculation, *Life and Writings of Sir Thomas Craig*, at pp. 16-18, that Craig may have studied law in Paris under 'Peter Rebuffy' and 'Francis Baldwin' (Petrus Rebuffus and Franciscus Balduinus), though doubted as early as 1839 by Irving, *Lives of the Scotish Writers*, Vol. 1, p. 149, is repeated by Walker, *The Scottish Jurists*, p. 54. It must be doubted: see D. Baird Smith, *Sir Thomas Craig, Feudalist*, Scottish Historical Review 12 (1915), pp. 271-302 at pp. 273-4 and note 2 on p. 273. J. Durkan, *The French Connection in the Sixteenth and Early Seventeenth Centuries*, in Scotland and Europe, 1200 – 1850, ed. T.C. Smout (Edinburgh, 1986), pp. 19-44, at pp. 26-7, points out that entering advocates applying for admission commonly stated where they had studied law. Craig's application and admission unfortunately are not noted in the Books of Sederunt: *ibid.*, p. 44.

28. Baird Smith, *Sir Thomas Craig, Feudalist*, at pp. 273-4.

29. *Ibid.*, pp. 294-5.

30. *Ibid.* Baird Smith gives as instances (*ibid.*, p. 294, note 2), *Jus Feudale*, 2.6.29 and 2.11.10 for criticisms of Hotman, generally greatly praised by Craig.

31. See note 1 *supra* for the full title in Latin. Whether or not this title was that given to the treatise by Craig does not affect the point.

Such an approach to study of Scots law was necessary, because it allowed Craig to compare 'our legal usage with the written feudal law to the extent' that he might 'reduce our law, which is believed by many to be vague and uncertain into some structure and method'[32]. Commentators have long recognised that the work involves an interplay between feudal law, viewed as a type of universal law, and Scots law, though they have generally not attempted to specify exactly what is the nature of that interplay[33]. In fact, the construction of some of the titles of *Jus Feudale* in some ways resembles that of those of Stair's *Institutions*[34]. Craig is apt to give an account of the general feudal law before turning to a description of the extent to which Scots law conforms to or departs from it[35]. This is similar to the familiar way Stair moves from natural law to Scots law in individual titles. As the demands of his text require, Craig nonetheless will shift from Scots law to feudal law, or, for that matter, to that of England or France, while making comparisons with principles drawn from the Civil law. His method will become clearer in the second part of this paper.

Craig probably started writing *Jus Feudale* sometime in the late 1590s, and was still working on it, perhaps revising it, at least as late as 1606[36]. It is worth noting that it was apparently only after he had started work that he became interested in the comparison with English law[37]. This strongly suggests that his in-

32. Craig, *Jus Feudale*, p. viii: 'usum tantum forensem nostrum cum jure feudorum scripto contuli, ut jus nostrum, quod vagum et incertum a plerisque creditur, in aliquam formam et artem redigerem'.

33. See. e.g., A.C. Black, *The Institutional Writers*, 1600–1826, in An Introductory Survey of the Sources and Literature of Scots Law, ed. H. McKechnie (Stair Society, Vol. 1, Edinburgh 1936), pp. 59-69 at p. 62; Walker, *The Scottish Jurists*, p. 64; Cairns, *Institutional Writings in Scotland Reconsidered*, p. 100.

34. *Cf.* the full title of Craig's *Jus Feudale*, text at note 31 *supra*, with that of Stair's *Institutions*, note 9 *supra*.

35. Craig, *Jus Feudale*, 3.3.5 explicitly confirms this to be his general approach.

36. On the variety of suggested dates, see Black, *The Institutional Writers, 1600–1826*, p. 62; Walker, *The Scottish Jurists*, p. 57; Baird Smith, *Sir Thomas Craig, Feudalist*, p. 280; Clyde, trans., *Jus Feudale*, Vol. 1, p. xix; Galloway, *The Union of Scotland and England*, p. 54 note 24, and pp. 146-7. The dates I have given in the text are based on the fact that in *Jus Feudale*, 2.3.34, Craig, in dealing with the loss of the feu for non-payment of feu duty for a certain period, writes, 'quod etiam in postremis comitiis apud nos introductum est, et, quod magis [1655: majus] mirum est, tempus coarctatur ad biennium' ('which has also been introduced among us in the last parliament, and, what is more surprising, the time is reduced to two years'). This is recognizable as the Feu-Duty Act, 1597, *A.P.S.*, Vol. 4, p. 133, c.17 (1597). This passage was written, therefore, between 1597 and 1600, the date of the next parliament of James VI. This date for working on at least part of *Jus Feudale* is roughly confirmed by the date of the copying (6 March 1602) of National Library of Scotland, Adv. MS. 16.2.25 at p. 1 of which Craig remarks that he undertook *Jus Feudale* above two years before. In *Jus Feudale*, 2.20.23 he cites an Act of July 1606. I hope to examine elsewhere in detail the various dates mentioned or alluded to in *Jus Feudale*.

37. In National Library of Scotland, Adv. MS. 16.2.25, p. 1, after writing that he began to study the feudal law, not because he had anything new to add, 'sed ut nostrae gentis jus omne ab eo tanquam fonte defluxisse, ejusque regulis et rationibus niti, omnibus manifestum est. At cum mens hominis ad ulteriora semper feratur, coepi etiam de jure quo vicini nostri utuntur inquirere, si forte et illud cum jure feudali affinitatem aliquam haberet', which Ridpath, *Scotlands's Soveraignty Asserted*, pp. 1-2, translates as 'but because, as is manifest to all Men, the Laws of our Country do flow from thence, as from their Fountain, and have a Dependance on the Rules and Maxims thereof. But the Mind

tentions in writing were not so inextricably bound up with the union project as is sometimes suggested[38]: no doubt in composing *Jus Feudale* he had a number of purposes which developed and changed over the years of working on it. He obviously anticipated that many of his readers would be young men studying law, and he explicitly wrote for them[39]. This is why it is particularly apt that Baillie, in his dedication of the 1732 edition to George II, described Craig as *'Cragius Noster'*[40] (a conceit we also find in the unpublished Latin inaugural lecture of Alexander Bayne, first Professor of Scots law in the University of Edinburgh)[41]. This cannot be other than an elegant complimentary comparison with Gaius[42]. Burnet alludes to this aspect of Craig's work, as well as to its more general purposes, in comparing it to that of Justinian in bringing light out of darkness[43].

In sum, *Jus Feudale* was written by a lawyer of great learning, whose knowledge not only had been acquired through a humanist education, but also had been accumulated over a long and successful professional life. Furthermore, it is a work professedly giving a shape to the inchoate mass of Scots law by compar-

of Man being naturally desirous of farther Knowledg, I began likewise to enquire into the Laws of our Neighbours, to see if there might not be also some Affinity betwixt theirs and the *Feudal Law*'. Cf. *Jus Feudale*, p. vi.

38. *Cf.*, Baird Smith, *Sir Thomas Craig, Feudalist*, p. 280; Tytler, *An Account of the Life and Writings of Sir Thomas Craig of Riccarton*, pp. 156-57.

39. See Craig, *Jus Feudale*, 1.8.6: 'Superest, ut de eo jure quo nostri hodie uti solent aliqua dicamus, ut intelligant juniores, quorum studia hoc opusculo promovere cupio, quoties in salebras inciderint, quo sit recurrendum'. ('It remains for us to say something about that law which our people are accustomed to use today, so that young men, whose studies I want to advance by this small work, may understand how often they have fallen into the ruts [in the road] by which they must return'). *Ibid.*: 1.9.33: 'Hic pauca, ad juventutis studia promovenda, de contractibus bonae fidei, et stricti juris adjiciam'. ('I may here add, to advance the studies of the young, a few things about contracts of good faith and strict law'). *Ibid.* 2.13.9: 'Sed ut ad successionis redeamus, quas nos *hereditates* dicimus, in juniorum gratiam, et ut eorum studia promoveamus, qui, differentias cujusque juris ab alio cupiunt dignoscere, hunc ordinem sequemur . . .'. ('But so that we return to the successions, which we call *of heirs*, we shall follow this order to please young men, and so that we may advance their studies, who desire to distinguish the differences of each [system of] law from the other . . .'). In the dedication, *ibid.*, p. viii, Craig had written: 'Hoc saltem mihi promittere audeo, si juventuti reip. administrandae cupidae haec nostra placuerint, vel me invito perlegentur; sin minus, ne, rogante me, quisquam erit qui attinget'. ('I dare at least to promise to myself this, if these our words will have pleased young men desiring to administer the commonwealth, they will be read even against my wishes; if otherwise, on my being asked, there will be no one who will touch them').

40. Craig, *Jus Feudale*, pp. iii-iv (dedication by Baillie). In the life of Craig in Baillie's edition, *ibid.*, pp. xvi-xx, he is again regularly referred to as 'Cragius noster'.

41. Edinburgh University Library, MS. Dc. 3.57, 'Oratio Inauguralis Alex. Bain Legis Municipalis Scotiae pp Habita in Academia Edinburgh: – 1724', at p. 5, Craig is described as 'Doctissimus . . . Cragius noster', at p. 14 as 'Eruditissimus noster Cragius' and at p. 15 as 'Laudatissimus Noster Cragius'.

42. See, e.g., A.M. Honoré, *Gaius* (Oxford 1962) at pp. xi, 1-11 and 129 for a discussion of the term 'Gaius noster'.

43. Craig, *Jus Feudale*, p. x: 'Justinianus hic noster Scoticus'; and at p. xi: 'primus Auctor noster, tanquam alter Justinianus, lucem e tenebris eruit'. Gatherer, side-note at start of his unpaginated dedication of his trans., Craig, *Right of Succession*, suggests Burnet thus initiated a common comparison. See also A. Bayne, *A Discourse on the Rise and Progress of the Law of Scotland, and the Method of Studying it*, in his ed. of T. Hope, *Minor Practicks* (Edinburgh 1726), p. 183.

ing it with, and setting it against, the general feudal law and the laws of other nations. This comparative aspect means that it is not always exclusively focussed on Scots Law. It is also an outstanding work, not only in Scotland, as comparison with Balfour's *Practicks* or Hope's *Practicks* readily demonstrates[44], but also in Europe, as its publication in a new edition in 1716 in Leipzig indicates (though the comparative nature of much of the text no doubt also promoted the European edition)[45].

II

Robertson's argument that Craig's treatise is 'the source of all the later statements that the *breve testatum* was the forerunner of the charter in Scotland'[46], is based on two texts, which he quotes as follows from Lord Clyde's translation:

> (i) In former days no doubt it [proper investiture] was performed with more ceremony than is used now; for the compeers of the superior's court used to attend, which added much to the importance of the occasion. Later the superior became bound, if the vassal demanded it, to give him a *breve testatum* as a record of the investiture[47].
>
> (ii) It is certain that what we know as the charter was evolved from the *breve testatum*, the use of which in former days has already been referred to .... If the charter-chests of any of our old families are examined, many of these charters in miniature will be discovered[48].

Robertson's case seems plain and irrefutable. If, however, we examine all of Craig's statements about the *breve testatum* – and examine them in Latin rather than Lord Clyde's sometimes misleading translation[49] – and put them in context, a significantly different picture emerges.

Craig's first mention of the *breve testatum* comes towards the beginning of his title, *De feudi constitutione; deque investitura propria et impropria* ('About the constitution of a feu; and about a proper and improper investiture'), the second title of the second book. For Craig, proper investiture took place on the land itself, and was where the superior put the vassal directly in possession of the feu; whereas improper investiture took place off the land, and involved the use of symbols or some type of written instrument. In the course of a general discussion

44. J. Balfour, *Practicks*, ed. P.G.B. McNeill (Stair Society, Vols. 21 and 22, Edinburgh 1962 – 63); and T. Hope, *Major Practicks*, ed. J.A. Clyde (Stair Society, Vols. 3 and 4, Edinburgh 1937 – 38) are both somewhat undigested collections of diverse material, far removed from the elegant and erudite work of Craig. The former is rather earlier, and the latter rather later, than *Jus Feudale*.

45. See note 1 *supra*.

46. Robertson, *The Illusory 'Breve Testatum'*, p. 85.

47. Clyde, trans., *Jus Feudale*, Vol. 1, pp. 377-78 (2.2.13).

48. *Ibid.*, Vol. 1, pp. 379-80 (2.2.16). Robertson, *The Illusory 'Breve Testatum'*, p. 85 has omitted 'now', inserted by Clyde between 'we' and 'know'.

49. Lord Clyde's task was, of course, an enormous one, and errors are understandable. His translation should be used with caution, though I may add that I found it useful.

of whether investiture gives possession of a feu or merely a title to it, he set out the views of unnamed authors, before mentioning specifically those of Baron, Cujas, and Le Douaren, the last of whom he considers as having an opinion midway between those of the others. He then writes:

> adeo ut, ex ejus opinione, investitura, aut sit illud Breve testatum quod apud nos *Charta* dicitur ... aut alioqui illud symbolum quo in traditionibus hae septentrionales gentes uti solitae[50].

Here Craig, talking about Le Douaren's views on the general feudal law, explains, almost as an aside, that a *breve testatum* is what we call a charter[51]. This implies that *breve testatum*, as a term of art, was one which he did not consider likely to be familiar to his Scottish readers.

The next mention of the *breve testatum*, the first of the two singled out by Robertson[52], is in part of Craig's continuing discussion of proper and improper investiture. This discussion is not specifically about Scots law, but rather about feudal law generally. Were it about Scots law, Craig would have given some indication, as, for example, he did in a slightly earlier passage when he wrote: *Hujus etiam propriae et impropriae investiturae exempla apud nos habemus*[53]. There is no such sign. Lord Clyde thought that the last part of the previous paragraph (in Baillie's edition), which states *sed ex nostris moribus, et majorum nostrorum observatione, quaestio fortasse illustrabitur*[54], belonged to the beginning of this one, and reparagraphed the work accordingly. He then mistranslated *A principio nulla erat investitura nisi propria* (the start of Baillie's new paragraph) as 'For originally, all our investitures were of the proper kind'[55]. Even if Lord Clyde is right in his reorganization of the paragraphs, it is clear that the sentence starting *A principio* does not refer to Scots law[56],

50. Craig, *Jus Feudale*, 2.2.4: 'so that, according to his opinion, investiture is either that *breve testatum* which amongst us is called a charter ... or otherwise that symbol which the northern races have been accustomed to use in transfers'.

51. Clyde's translation of this passage (2.2.4) of *Jus Feudale*, Vol. 1, p. 369, ignores 'apud nos'.

52. Craig, *Jus Feudale*, 2.2.13 (see note 47 *supra*).

53. Craig, *Jus Feudale*, 2.2.10: 'We have, among us, also examples of this proper and improper investiture'.

54. Craig, *Jus Feudale*, 2.2.12: 'but the issue will perhaps be illustrated from our customs and the observation of our ancestors'. Lord Clyde, Vol. 1, p. 377, translates this as follows: 'But an examination of our own Scottish customs and those of our own forefathers throws considerable light on them'.

55. Clyde, trans., *Jus Feudale*, Vol. 1, p. 377. This may be translated as: 'From the beginning, there was no investiture unless it was proper'.

56. Craig, *Jus Feudale*, 2.2.13: 'A principio nulla erat investitura nisi propria, dominusque in locum feudi veniens, vassallum praesentem super ipso solo fundi, praesentibus Paribus curiae, investiebat, possessionemque, qualem dominus habebat, ipsi tradebat; adeo ut si dominus corpore non possidebat, sed fructus tantum colligere solitus erat, talem possessionem vassallo tum tradebat, vacuam postea ab ipsis colonis praesturus'. ('From the beginning there was no investiture unless it was proper, and the superior, coming onto the place of the feu, in the presence of the peers of the court, invested the attending vassal upon the very land of the feu, and conveyed to the vassal himself possession such as the superior had; to the extent that, if the superior did not possess by body, but was accustomed to collect so much of the fruits, he then conveyed that kind of possession to the vassal, guaranteeing thereafter (possession) free from those tenants').

because the sentence following contrasts with it by stating that *Talis apud nos est illa investitura*. Craig is shifting his discussion back and forward between Scots law and the general feudal law. This second sentence is as follows:

> Talis apud nos est illa investitura, quam *propriis manibus* dicimus, cum dominus propriis manibus vassalum investit; nisi quod tum major solennitas adhibebatur, nempe praesentia Parium curtis, quae non levem auctoritatem investiturae praebebat; dominusque postea Breve testatum, vassallo requirente, reddere tenebatur, quo se illam investituram praebuisse testificabatur[57].

The change of tenses in this sentence is crucial. Down to the first semi-colon, the present tense is used: 'Such is that investiture among us which we call *propriis manibus*, since the superior with his own hands invests the vassal'. Thereafter, the tense of the verbs shifts back to the imperfect, linking with the previous sentence which, once we ignore Lord Clyde's mistranslation, we can recognise as dealing with feudal law generally. The illustration drawn *ex nostris moribus* is completed, and the remainder of the sentence again deals with the general feudal law: and it is here that the *breve testatum* is mentioned. This argument is supported by the consideration that the *next* sentence, the last of the paragraph in Baillie's edition, talks of Scots law, and the verbs again shift into the present tense[58]; and in this sentence, it may be noted that he talks of a *charta*, not a *breve testatum*. It may further be pointed out, that even were Craig referring to Scots law using the term *breve testatum*, he might have used it simply as an alternative to *charta*, since he had already stated that *brevia testata* were called *chartae* in Scotland[59].

The next use of the term *breve testatum* is in Robertson's second, and apparently more convincing, quotation. Close examination shows that this passage also gives him no support. The passage Lord Clyde translated as, 'It is certain that what we now know as the charter was evolved from the "breve testatum", the use of which in former days has already been referred to', in fact reads thus: 'Chartam *autem nihil aliud esse constat, nisi* Breve *illud* testatum, *quod a veteribus usurpabatur* ...'[60]. This may be translated as follows: 'It is settled that a charter is nothing else than that *Breve testatum* which was employed by

57. Craig, *Jus Feudale*, 2.2.13: 'Such is that investiture among us which we call *propriis manibus*, since the superior with his own hands invests the vassal; except that, at that time, a greater formality was used, indeed the presence of the peers of the court which offered a not light authority of investiture; and the superior afterwards was held to return a *breve testatum* to a vassal requiring one, by which he gave evidence to having himself presented that investiture'.

58. Craig, *Jus Feudale*, 2.2.13: 'Itaque omnes nostrae sasinae, quae propriis manibus dominorum fiunt, propter militaria servitia praesumuntur concedi, et naturam feudi recti sive proprii sequi; Wardamque et Relevium, cum heredis maritatione domino debent, dominusque adhuc apud nos chartam in ea forma redditionis praestare cogitur'. ('And so all our sasines which are made by the superior's own hands [*propriis manibus*], are presumed to be granted on account of military service and to follow the nature of the true or characteristic feu; and they owe to the superior, ward and relief with the marriage of the heir, and the superior, among us, is constrained in addition to furnish a charter in that form of return').

59. Craig, *Jus Feudale*, 2.2.4 and see *infra*.

60. Craig, *Jus Feudale*, 2.2.16, and see Clyde, trans., Vol. 1, p. 379.

the ancients (*veteres*) . . .'. This gives a rather different flavour to the passage. Furthermore, Robertson's linking of this passage with the final part of the paragraph (using Baillie's paragraphing) is misleading. Craig *is simply not talking about Scotland* at the beginning of this paragraph. He has finished his account of proper investiture, and has turned to discussing improper investiture. In the quoted passage, Craig is talking of the general *jus feudale*. He goes on, at some length, to explain improper investitures, and the use of *brevia testata*. We are meant to understand him as talking of the general development of feudal law, and not of Scots law in particular. This is evident from his introduction of an illustration from Scotland:

> Hujus nostrae observationis exempla adhuc habemus apud nos; neque enim omnia antiquitatis vestigia adhuc exoleverunt: nam in limitaneis regni partibus, et inter montanos, nostro aevo, propriam investituram retinebant, cum dominus in loco feudi constitutus, vel lapide, vel fasce graminis, vel baculo, possessionem tradebat sine scripto, praesentibus tantum ejusdem Baroniae, sive dominii, si non Paribus, saltem accolis[61].

His need to stress that this is *apud nos* indicates that the preceding passage was not talking of improper investitures *apud nos*. The next, and final, passage in the paragraph reads:

> In locis mediterraneis, his quingentis annis elapsis, Breve testatum, quod nos *Chartam* dicimus, soliti sunt vassalli a dominis suis accipere, quo se investiisse vassallum, eique jus et possessionem tribuisse, domini significabant; quae merito *Brevia testata* dici poterant: nam si quis antiquarum familiarum monumenta excusserit, brevissimas chartas has, compendiosamque earum formam reperiet.

In his translation, Lord Clyde entirely omitted to translate the (for our purposes) crucial '*quod nos* Chartam *dicimus*', and translated *quingentis* as if it were *quinquaginta*[62]. The passage may be translated:

> In the Mediterranean countries, five hundred years ago, vassals were acccustomed to accept from their superiors a *breve testatum*, which we call a charter, in which the superiors indicated that they themselves had invested the vassal, and bestowed on him right and possession; which can deservedly be called *brevia testata*: for if anyone searches the muniments of ancient families, he finds these very small charters, and the abbreviated style of them.

Even were Lord Clyde correct in inserting 'our' before 'old families', thus making these last clauses refer to Scotland, which seems unlikely, Craig is still far

61. *Ibid.*: 'Among ourselves hitherto we have examples of our observation of this; for neither have all traces of antiquity as yet decayed: for in the remote parts of the kingdom, and among the mountains, in our era, they preserve proper investiture, when the superior handed over possession, without a written deed, standing on the place of the feu, either by a stone, or by a bunch of grass, or by a staff, in the presence of so many of the same Barony, whether, if not the peers of the superior, at least the neighbours'.

62. Clyde, trans., *Jus Feudale*, Vol. 1, p. 380. He also omitted a translation of '*quae merito* Brevia testata *dici poterant*'.

from saying that, in Scotland, charters developed out of the *breve testatum* and many examples of *brevia testata* can be found in Scottish collections; though it undoubtedly is the case that early charters were *brevissimae*[63]. Furthermore, Craig has again stressed that the *breve testatum* is called a charter in Scotland.

In the very next paragraph, Craig again talks of the *breve testatum*, and explains that with the passage of time improper investiture became more common than proper, and, for various reasons not germane here, vassals obtained a *breve testatum* from the superior, *et praeter illud, mandatum scriptum ad Ballivum pro sasina tradenda, nos* Praeceptum sasinae *dicimus, et praeterea ut ipsa traditio possessionis publico instrumento significaretur*[64]. He then says that investiture, which had thus been one act, became divided into two or three: '*in* Breve testatum, *quam chartam dicimus*; *in mandatum, sive* praeceptum sasinae; *et in* traditionem possessionis'[65]. He again stresses that the Scottish term is 'charter'[66], just as he generally stresses here the Scottish terminology. He concludes by stating that, 'Among us [i.e. the Scots] few precepts and few instruments of sasine are found among the muniments of old families, for they were satisfied with that ordinary *breve testatum*'[67]. This would seem to be a strong piece of evidence in favour of Robertson's views; but Craig has been careful in this paragraph to point out that the Scots call the *breve testatum* a charter, which strongly suggests that he is just using the general term, without any intention to imply that the Scots had such a specialized, named deed. Apart from the asides about Scotland, the whole paragraph concerns the history of improper investiture in the general feudal law.

The next paragraph contains some of Craig's more improbable history[68], and in it he twice talks of the use of the *breve testatum* in Scotland; but certainly in one instance, it is not clear that he is doing other than employing the term as a synonym for *charta*, especially given what he has already said on this[69]. The other instance is more difficult. Craig writes:

63. See, most recently, G.W.S. Barrow, *The Scots Charter* in Studies in Medieval History Presented to R.H.C. Davis, ed. H. Mayr-Harting and R.I. Moore (London 1985), pp. 149-64. For more detailed information, see the introduction to the volumes, which have so far appeared, of the *Regesta Regum Scottorum* (Edinburgh 1960, 1971 and 1982), Vols. 1, 2 and 6.

64. Craig, *Jus Feudale*, 2.2.17: 'and in addition to that, the mandate written to the Baillie for the giving of sasine, we call a precept of sasine, and so that the handing over of possession was recorded moreover in a public instrument'.

65. Craig, *Jus Feudale*, 2.2.17: 'into the *breve testatum*, which we call a charter; into the mandate, or *precept of sasine*; and into the *delivery of possession* . . . '.

66. Clyde, trans., *Jus Feudale*, Vol. 1, p. 381 does not bring out this, as he translates *quam chartam dicimus* as 'or charter'.

67. Craig, *Jus Feudale*, 2.2.17: 'Apud nos inter veterum familiarum monumenta pauca praecepta, pauca sasinarum instrumenta reperiuntur; contenti enim illi erant brevi illo simplicique testato'. Clyde, Vol. 1, p. 381 translates this: 'In titles of old date but few precepts or instruments of sasine are to be found, our forefathers being content with the compendious "breve testatum"'.

68. Craig, *Jus Feudale*, 2.2.18 suggests that James I brought with him, on his return from captivity in England, both the chancery and the use of instruments of sasine.

69. *Ibid.*: 'Sed adhuc sasinarum non erant instrumenta; majores enim nostri solebant has sasinas sigillo Vicecomitis sive officiarii dantis extra burgum tantum munire, et eo sigillo, Brevi testato affixo, sasinam datam probare'. ('But hitherto there were not instruments of sasine; for our ancestors were accustomed to authenticate these sasines by the

> Nam licet ab initio praesens inductio domini in possessionem sufficiebat, tamen posteriores investituram impropriam maluerunt; quia Breve testatum, cum mandato ad Ballivum, et publico sasinae instrumento, ad perpetuam rei gestae confirmationem potius conducere videbatur: dumque uni detrahunt, ut alteri addant, ita in diversa distraxerunt, ut pene separata jam jura sint, nempe charta et sasina.

Though not referred to by Robertson, this passage is the one most strongly in his favour – if not so much in his favour as the translation by Lord Clyde would suggest[70]. It may be rendered thus into English:

> For although at first the personal induction of the superior sufficed for possession, however those coming after preferred improper investiture; because it seemed that the *breve testatum* with the order to the baillie and the public instrument of sasine, led better to the perpetual security of the transaction: and whilst the ones diminished as the others increased, so they pulled apart in different ways, so that now titles (*jura*) are all but separated, certainly into charter and sasine.

The answer to the argument in favour of Robertson's view is undoubtedly that Craig uses *breve testatum* simply as an alternative to *charta*. He is not intending to convey that there was once a special type of deed which was called a *breve testatum*, which was used in a special way, and which was supplanted by a charter. This is especially so, if Craig seriously thought that the use of instruments of sasine only came to Scotland from England when James I returned from captivity in 1424[71], because otherwise his statement that 'in the time of our ancestors, a vassal was compelled to guard his charter at his peril, and to produce it to his superior requiring its exhibition, and loss of the feu followed loss of the charter'[72], would be wrong, if what had to be produced was a special *breve testatum*.

Craig's next reference to the *breve testatum* is in the following passage:

> This investiture, moreover, about which we are now speaking, without the formality of witnesses cannot be made or proved: nor does even a *breve testatum* suffice as proof; for it is a legal act, which consists of a settled ceremony, without the observation of which formality the act is void: for that formality is, so to speak, the essential. Nor, however, according to the [feudal] law (*ex jure*) do any witnesses whatsoever suffice

seal of the sheriff or of the official giving (sasine) in so far as they were outwith a burgh, and by that seal attached to the *breve testatum* to prove sasine had been given'). Craig adds that in a burgh the seal of the baillie sufficed.

70. Clyde, trans., *Jus Feudale*, Vol. 1, pp. 381-2 renders this: 'Whereas at first the personal delivery of possession by the superior was all that was required, in later times a preference grew up for the forms of improper investiture, because the 'breve testatum', accompanied by a warrant to the baillie and followed by the public instrument of sasine, promised better and more permanent evidence of the transaction recorded by them. The limitation thus imposed on the function of the 'breve testatum', and the increased importance assumed by the instrument of sasine, resulted in the end in making the vassal's title consist of only two separate parts, namely charter and sasine'.

71. Craig, *Jus Feudale*, 2.2.18.

72. *Ibid.*: 'Itaque majorum nostrorum tempore, vassallus suo periculo chartam custodire tenebatur, et domino exhibitionem poscenti producere; ejusque amissionem feudi amissio sequebatur'.

> in the proof of this investiture; but they ought to be peers of the court [i.e. of the superior], otherwise the act will not be valid[73].

The reference to *jus*, by which Craig means the general *jus feudale*[74], indicates that this text does not deal with Scots law, which he typically refers to as *usus noster*, rarely as *jus*[75]. It adds nothing in favour of Robertson's thesis.

Craig makes no further references to the *breve testatum* in this title; but in the first two paragraphs (following Baillie's edition) of the third title of the second book, *De prima parte Investiturae impropriae quam Chartam dicimus* ('About the first part of improper investiture which we call a charter'), the *breve testatum* is again mentioned. Craig briefly recaps the earlier title:

> Differentiam inter Investituram propriam et impropriam superiore Diegesi exposuimus, utque impropriae usus apud nos esset frequentior, et qua occasione id factum; praeterea investiturae impropriae partes tres fuisse, nempe Breve illud testatum, quod a domino vassallo datur (nos *Breve* hoc *Chartam* dicimus). *Praeceptum* seu mandatum domini Ballivo suo de possessione tradenda. Tertia hujus impropriae investiturae pars, est possessionis illius per Ballivum traditio, nos *Sasinam* dicimus[76].

In these sentences Craig once more sets out the general feudal law with some specific references to Scots law, and he points out that in the preceding title he had shown: that improper investiture was more common in Scotland than proper, and that he had explained why; that we called 'sasine' the delivery of possession; and that we called this *breve* a charter. Again there is no evidence that he believed there to have been a special deed called a *breve testatum* in Scotland. Lord Clyde translates '*nos* Breve *hoc* Chartam *dicimus*' as 'now known as the charter' which gives a very different appearance to his text[77]. Craig next men-

73. Craig, *Jus Feudale*, 2.2.23: 'Haec autem investitura, de qua nunc loquimur, sine testium solennitate fieri aut probari non potest: neque etiam Breve testatum ad probationem sufficiet; actus enim est legitimus, qui ex certo ritu constat, sine cujus solennitatis observatione actus vitiatur: nam solennitas illa est quasi forma. Neque tamen quicunque testes, in hac investiturae probatione, ex jure sufficiunt; sed Pares debent esse curtis, alioqui actus non valebit'.

74. See, e.g., from this title, Craig, *Jus Feudale*, 2.2.5 'Nam ex jure, investituram ut possessionis vacuae traditio subsequatur necesse est ...'); 2.2.32 ('Solennitates autem, quae investiturae a jure praescribuntur ...').

75. See, e.g., from this title, Craig, *Jus Feudale*, 2.2.3 ('in nostrum usum'); 2.2.19 ('ad nostrum usum forensem' [1655: 'ad usum nostrum forensem']); 2.2.26 ('Ex usu tamen nostro'). Reference to Scots law as *jus* is found in, e.g., 2.2.29 ('Usque adeo hoc ex usu et ex jure nostro constat') and 2.2.30 ('In jure tamen nostro'). My impression is that if he wishes to contrast Scots law with other laws, Craig is fondest of all of using the phrase '*apud nos*'. The differing use made of *usus, mos, consuetudo* and *jus* would seem likely to repay further study.

76. Craig, *Jus Feudale*, 2.3.1: 'We have set out in the previous title the difference between proper and improper investiture, and that among us the use of improper [investiture] was more frequent, and by which cause that had been brought about; moreover the parts of improper investiture were three, namely that *breve testatum* which is given by the superior to the vassal (we call this *Breve* a charter): the precept or mandate of the superior to his baillie about handing over possession. The third part of this improper investiture is the delivery through the baillie of such possession we call sasine').

77. Clyde, trans., *Jus Feudale*, Vol. 1, p. 395: 'In the preceding title I explained the difference between proper and improper investitures, and how it came about in Scotland

tions the *breve testatum* in talking of infeftment: *Scio* Infeofamenti *nomen strictius aliquando a nobis capi pro Brevi illo testato, sive Charta* ... ('I know the term "infeftment" sometimes by us to be taken more strictly for the *breve testatum* or charter'). That Craig adds '*sive Charta*' denies any special significance to his use of the term *breve testatum*[78].

Craig's final references in this title to the *breve testatum* are as follows:

> *Charta* ergo est illud Breve testatum, tenorem investiturae, quae a domino vassallo fit, continens per omnia; cujus tenor, ut saepius monui, semper attendendus: hocque ipsum Breve testatum domini, sigillo tanquam symbolo domini, antea (ut et hodie) muniebatur ...[79].

Lord Clyde translates this:

> The charter is the modern form of the 'breve testatum' (supra, 2.2.16 and 17). It contains the whole tenor of the investiture or infeftment which the vassal receives from the superior – a matter of much importance, as my readers know (supra, 1.9.35: 2.2.27). As in former times, so also to-day, it has affixed to it the grantor's seal ...[80].

Clyde's version introduces into the text a potentially misleading historical progression from *breve testatum* to charter. A better translation is:

> The charter, therefore, is that *breve testatum*, containing in all respects the tenor of the investiture which is made by the superior to the vassal; the tenor of which, as I have often pointed out, must always be attended to: and this very *breve testatum* of the superior was authenticated in the past (and as it is today) by a seal as much as the symbol of the superior ....

Craig here once more is stressing that charter and *breve testatum* are essentially the same. The historical development is wrongly introduced by Lord Clyde, and it is significant that he renders the second '*breve testatum*' as 'it': if he had not, the error in his translation would have been obvious.

The seventeenth title of Craig's second book is entitled *Communia de Successionibus* ('Common matters about successions'). In the course of it Craig discusses the entry of an heir by a brieve, and takes the opportunity to explain the origin of brieves and their use. He writes: '[A] brieve was nothing other than a kind of writing of the Prince by which he ordered the ordinary judge to say right concisely about a complaint assigned to him'[81]. He reports his view that brieves were most anciently used in France and states that they are still used in

that the improper prevailed over the proper form. My readers will remember that improper investiture consisted of three parts or stages: – first, the 'breve testatum' handed over by the grantor to the vassal now known as the charter; second, the precept or warrant given by the grantor to his baillie for delivery of possession; and third, the actual delivery of possession to the vassal by the baillie which we call sasine'.

78. Craig, *Jus Feudale*, 2.3.1.
79. Craig, *Jus Feudale*, 2.3.2.
80. Clyde, trans., *Jus Feudale*, Vol. 1, p. 396.
81. Craig, *Jus Feudale*, 2.17.25: 'Breve nihil aliud erat quam rescriptum quoddam Principis, quo ordinario judici mandabat, ut de querela ad eum delata jus diceret breviter ...'.

Normandy[82]. He explains that they came to England from Normandy and that 'almost all causes in England are still initiated by brieves'[83]. He then alludes to the *breve testatum* in his argument that brieves came to Scotland from England rather than from the feudal law:

> Ab Anglis ad nos pervenisse verisimilius est, quam ex jure Feudali: nam licet jus Feudale mentionem *Brevis testati* faciat, jusque nostrum ex eo jure defluxisse manifeste antea declaravimus, tamen cum ibi Breve potius probationis investiturae vim habere videatur, quam clamei, et pro probatione adducatur, certum est in ea significatione ad nos non devenisse; nunquam enim Brevi pro testatione aut testimonio utimur: itaque probabilius est, et Breve et ejus significationem et usum a Normannis ad Anglos, ab Anglis ad nos pervenisse[84].

This may be translated as follows:

> It is more probable that brieves have come to us from the English people than from the feudal law: for although the feudal law makes mention of a *breve testatum*, and we have earlier made clear that our law has derived from that law, nevertheless since the *breve* seems there more to have the force of proof of investiture, than the force of a claim, and is brought forward for proof, it is certain in that meaning not to have come to us; for we never use a brieve for evidence or testimony: and so it is more probable, that the brieve and its meaning and use have come from the Normans to the English, from the English to us.

This is conclusive. Craig's argument that the Scottish brieve ultimately derives from Norman practice is based on his recognition that the feudal *breve testatum* had not been received in Scotland and is not used in Scotland. Craig here shows considerable historical acumen.

III

What should be concluded from all this? First, Robertson's claim that it was

82. Craig, *Jus Feudale*, 2.17.25: 'Usum in Gallia antiquissimum puto, certe in Normannia adhuc in usu sunt . . .'. ('I think the use in France most ancient, and they are undoubtedly still in use in Normandy . . .').

83. Craig, *Jus Feudale*, 2.17.25: 'Gulielmus Conquaestor cum armis etiam leges Normannicas Angliae intulit; inde factum ut omnes fere causae in Anglia adhuc per Brevia expediantur'. ('William the Conqueror also introduced Norman laws into England with his soldiers; thence it has come about that almost all causes in England are still initiated by brieves').

84. Craig, *Jus Feudale*, 2.17.25. On brieves in Scotland, see now, above all, H.L. MacQueen, *The Brieve of Right in Scots Law*, Journal of Legal History 3 (1982), pp. 52-70, *Dissasine and Mortancestor in Scots Law*, in New Perspectives in Scottish Legal History, pp. 21-49, *Pleadable Brieves, Pleading and the Development of Scots Law*, Law and History Review 4 (1986), pp. 403-22, (with A. Borthwick), *Three Fifteenth-Century Cases*, Juridical Review (1986), pp. 123-51, and *The Brieve of Right Re-Visited* in The Political Context of Law, Proceedings of the Seventh British Legal History Conference, ed. R. Eales and D. Sullivan (London 1987), pp. 17-25. See also W.D.H. Sellar, *Courtesy, Battle and the Brieve of Right, 1368 – A Story Continued*, in Miscellany Two, ed. W.D.H. Sellar (Stair Society, Vol. 35, Edinburgh 1984), pp. 1-12.

Craig who, influenced by Lombardic law, first thought that there were special types of early deeds in Scotland called *brevia testata* which proved but did not constitute infeftment simply cannot be sustained. Craig just did not make the assumption that because the *breve testatum* had existed in Lombardy it had existed in Scotland[85]. Though Craig sometimes uses the term '*breve testatum*' as an alternative to '*charta*', he is generally quite clear that charters are the Scottish equivalents of what others might call *brevia testata*, and in most instances when he talks of the *breve testatum* he is not discussing Scots law. Furthermore, except in Lord Clyde's translation, Craig does not explicitly claim that *brevia testata* developed into charters. Ultimately, Craig definitely states that the special *breve testatum* of the feudal law was not introduced into Scotland.

This is further confirmed by Craig's specific account of the introduction of the charter into Scotland, in which he does not mention even once the *breve testatum*[86]. He writes that the form of charter in use today came to Scotland in the reign of Malcolm Canmore, along with the English language and customs[87]. Craig describes early, primitive charters and writes: 'I know of certain ones of such a nature in the possession of our great lords'[88]. He also refers his reader to Boece for examples[89]. He will also occasionally allude to a specific charter[90].

85. Robertson, *The Illusory 'Breve Testatum'*, pp. 86-87.

86. See Craig, *Jus Feudale*, 2.3.6-9.

87. Craig, *Jus Feudale*, 2.3.6: 'De forma Chartae qua hodie utimur, puto eam cum lingua et moribus Anglorum ad nos pervenisse, Malcolmo III. cognomento Canmor regnante'.

88. Craig, *Jus Feudale*, 2.3.6: 'tales esse quasdam apud magnates nostros scio'. For other references to ancient charters, see, e.g., *ibid.*, 2.4.14 and 15.

89. Craig, *Jus Feudale*, 2.3.6: 'Qui exempla quaerit, videat Chartam Athelstani Regis factam Paulino, de qua in primo Libro [1655: diegesi], et Chartam factam ab Alexandro Rege Huntero: utraque habetur apud Boetium et ejus interpretem'. ('Let he who seeks examples look at the charter of King Athelstan granted to Paulinus which is discussed in the first book [i.e. *Jus Feudale*, 1.7.4], and the charter granted by King Alexander to Hunter: and which [each?] is found in Boece and his translator'). The reference is to H. Boece, *Scotorum Historiae a Prima Gentis Origine* (Paris 1527) translated by J. Bellenden as *Hystory and croniklis of Scotland* (Edinburgh before 1540). Bellenden's translation is available as *The Chronicles of Scotland*, ed. by R.W. Chalmers and E.C. Batho (Vol. 1) and E.C. Batho and H.W. Husbands (Vol. 2) (Scottish Text Society, 3rd Ser., Vols. 10 and 15, Edinburgh 1938 (Vol. for 1936) and 1941). I failed to trace the passage referred to by Craig.

90. See, e.g., Craig, *Jus Feudale*, 2.3.29, where in talking of tailzies, he mentions that there could be as many as five or six substitutions, 'ut in investitura Comitatus Mortoniae vidi'. I suspect he is alluding to the 'Carta talliata de Dalketh Newlandis et Kylboughok per Willielmum de Douglas' in *Registrum Honoris de Morton* (Bannatyne Club, Edinburgh 1853), Vol. 2, p. 53 (no. 70), as this entail of 1351 apparently was crucial in the succession to the Earldom of Morton in 1588, after the death of Archibald, Earl of Angus and Morton, see *ibid.*, Vol. 1, p. xxi. On the fate of the Earldom after the fall and execution of the Regent Morton in 1581, and its ultimate restoration to the Douglas family, see now generally G.R. Hewitt, *Scotland under Morton, 1572-1580* (Edinburgh 1982), pp. 203-5. In 1587 the Earldom of Morton had been restored to the Earl of Angus, as heir, see *A.P.S.*, Vol. 3, p. 472, c. 63 (1587); *Registrum Honoris de Morton*, Vol. 2, pp. 316-18; and W. Fraser, *The Douglas Book* (Edinburgh 1885), Vol. 2, p. 361. In the reference to this particular charter, can we detect a trace of Craig's legal practice? At *Jus Feudale*, 2.7.1, he writes: '[I]n monumentis Domini de Rires annotavi, sasinam datam per apertionem et clausionem ostii, aedis, aut arcis'. ('[I]n the muniments of the Lord of Rires I have noted a sasine given by the opening and closing of the door of the house or tower').

He draws on his knowledge of old charters when, in criticising the use of unnecessarily lengthy clauses containing the particulars of the property, he writes that 'if anyone consults ancient muniments, he does not find this clause so long in them'[91]. Finally, we may note that he writes of Scottish charters that they are of one simple style (he is making a contrast with England) and also, the older they are the simpler they are[92]. He does not state that early deeds were different, and most notably, he does not say that they were called *brevia testata*. The suggestion that a man with Craig's extensive legal practice would not have been perfectly familiar with Scottish charters does in any case strain credulity. What Craig does say of the development of charters seems in general terms reasonably compatible with the description given by modern historians[93]. He may occasionally have fleshed out his account of the Scottish position by conjecture, drawing on his knowledge of other systems, but he does nothing as rash as claim that specialized deeds called *brevia testata* were used in Scotland. This is consistent with his later specific denial of the introduction into Scotland of the feudal *breve testatum*.

Robertson correctly points out[94] that Craig used and cited Eguinaire Baron's treatise *Ad Obertum Ortensium*[95]. Robertson is specifically interested in Craig's reference to Baron's comment, on a passage in the *Libri Feudorum*, that, *Ait*, Investitura, *Galli* vestu et saisy fu fief *eum dicunt, qui investitus est, id est, cui tradita est vacua possessio*[96]. Craig closely paraphrases this[97]. Robertson further notes that[98], later in the same passage, Baron, commenting on *publicum instrumentum*, said, '*Breve testatum alibi vocat, quod hic publicum instrumentum*'[99], citing his earlier comments on two texts of the *Libri Feudorum*, in one of which Baron says, *Breve testatum, id est publicum instrumentum*[100]. Robertson then writes: 'From the close juxtaposition of Craig's reference to Baron – where Baron has discussed the *breve testatum* – to his own discussion of the *breve testatum*, it is possible to suggest that Craig, who clearly held Baron in high esteem, based his discussion on Baron's definition of the *breve testatum*'[101]. Insofar as Baron's description of the *breve testatum* as a *publicum instrumentum* is a definition, it can probably be correctly said that Craig does not explicitly

91. Craig, *Jus Feudale*, 2.3.30: 'si quis consulat antiquiora monumenta, hanc clausulam ita extensam in iis non reperiet'.

92. Craig, *Jus Feudale*, 2.3.9: 'Ad nostres mores redeo, apud quos nulla aut rara feudi, aut Chartae feudalis dispositio est, nisi una, et ea simplex, quoque antiquior, eo simplicior . . .'.

93. See Barrow, *The Scots Charter, passim*, and G. Donaldson, *Aspects of Early Scottish Conveyancing*, in Formulary of Old Scots Legal Documents, compiled by P. Gouldesbrough (Stair Society, Vol. 36, Edinburgh 1985), pp. 153-86.

94. Robertson, *The Illusory 'Breve Testatum'*, p. 90.

95. E. Baron, *Ad Obertum Ortensium, de Beneficiis, Commentarii, Methodo in eundem subiecti* (Lyon 1549).

96. *Ibid.*, p. 40 on 2.2: 'He says Investiture, the French say he is vested and seized of the fief who has been invested, that is, to whom has been delivered vacant possession'.

97. Craig, *Jus Feudale*, 2.2.11.

98. Robertson, *The Illusory 'Breve Testatum'*, p. 90.

99. Baron, *Ad Obertum Ortensium*, p. 40 on 2.2: 'He calls elsewhere *breve testatum*, what here he calls a public instrument'.

100. *Ibid.*, p. 10, on 1.2: '*Breve testatum*, that is public instrument'. See *infra*, text on note 108, on his comment on 1.4.

101. Robertson, *The Illusory 'Breve Testatum'*, p. 90.

follow it. In no text does he so describe the *breve testatum*. All that Craig ever states is that the *breve testatum* is called a charter, or that it is a means of proving investiture if demanded by a vassal. If anything this is more reminiscent of Hotman's comment on the *breve testatum* that it is: '*Testationem literis consignatam: Alibi dicitur, per chartam, per scripturam, per libellum*'[102]. Craig appears to reserve the description *publicum instrumentum* for instruments of sasine[103]. In any case the point is too trivial to be of guidance, and it may be pointed out that the description of the *breve testatum* as a *publicum instrumentum* is scarcely unique to Baron. Cujas also so refers to the *breve testatum* in his *De Feudis*: a work often cited by Craig[104]. Robertson seems to have been misled by his view that Baron's work was more certainly available to Craig than were the books of other writers whose works were published after Craig had left France[105]. This is mistaken. Hotman, for example, was obviously a favourite author whom Craig cited, and praised, more than any other[106]. Since Craig cites a work first published in 1597, he obviously kept abreast of the modern European literature[107].

Baron was – as Robertson rightly points out[108] – esteemed by Craig, who described him as *inter Neotericos magni nominis*, and *vir magni nominis*[109], and Craig was perfectly familiar with his work. It is therefore worth noting, in a comment Baron made on investiture, the following sentence:

> Hic per pares curiae, vel breve testatum a quibusvis confirmatum, probari posse significat apud Mediolanenses: et ideo cogendum dominum possessionem vacuam tradere, et ita naturaliter investire, quem civiliter baculo porrecto investierat[110].

This passage could only have reinforced Craig's recognition that the *breve*

102. F. Hotman, *In Libros Feudorum Commentarii*, in *De Feudis Commentatio Tripertita: Hoc est, Disputatio de jure Feudali. Commentarius in usus Feudorum. Dictionarium verborum Feudalium* (Lyon 1573), p. 143: 'Evidence recorded in writing: elsewhere it is called, by charter, by writ, by deed'. See also *De Verbis Feudalibus, Commentarius*, p. 11, s.v. '*Breve testatum*', in *De Feudis Commentatio Tripertita* (separately paginated), and *Disputatio de Feudis*, in *ibid.*, p. 83.

103. See Craig, *Jus Feudale*, 2.2.17 and 18; *cf.* 2.2.4; 2.2.13; 2.2.16; 2.2.23; 2.3.1; 2.3.2; 2.17.25.

104. J. Cujas, *Opera, Quae de Jure Fecit* (Frankfurt 1623), Vol. 3, *De Feudis, Libri Quinque*, col. 663E: 'ex brevi testato, id est, breviculo sive instrumento publico' ('by *breve testatum*, that is by small brief or public instrument'). *Cf. ibid*, Vol. 3, *Ad Librum X Codicis Dn. Iustiniani Commentarii*, col. 231 H, where Cujas describes *brevia* as charters. Craig cites Cujas about half as many times as Hotman.

105. Robertson, *The Illusory 'Breve Testatum'*, pp. 89-90.

106. See Craig, *Jus Feudale*, 1.4.10; 1.9.6; 1.16.1; 3.3.1; and 3.3.31. Craig cites Hotman approaching 30 times, and his influence on *Jus Feudale* is pervasive.

107. J. Schöner, *Feudalium disputationum libri duo ... quibus universa feudorum materia ... exposita est* (Frankfurt 1597). (See *Jus Feudale*, 1.9.4; 1.10.7; 2.2.30; 2.11.16; 3.3.31.) I am grateful to Dr. D. Osler for confirming that this is the only edition known of Schöner's book.

108. Robertson, *The Illusory 'Breve Testatum'*, p. 90.

109. Craig, *Jus Feudale*, 2.2.4: 'of high repute among the new authors'; *ibid.*, 2.2.11: 'a man of high repute'. Baron is also found cited by Craig in *ibid.*, 1.9.20 and 1.12.14.

110. Baron, *Ad Obertum Ortensium*, p. 11, on 1.4: 'Here he shows it to be possible to be proved among the Milanese by the peers of the court or a *breve testatum* confirmed by anyone: and therefore the superior must be compelled to hand over vacant possession, and thus to invest naturally him whom he invested civilly with an extended staff'.

testatum as a means of proving prior investiture was Lombardic and not received in Scotland. As he himself put it: a document commonly used five hundred years ago in the mediterranean countries[111].

Robertson is correct in pointing out that Scottish authors since Craig seem to have argued that there was in Scotland a development from a special deed called a *breve testatum* to the charter. In fact, in the current edition of his *Principles*, Professor Walker still states this, though referring to Robertson's article in a footnote, while even more recently, Professor Halliday has seemed quite unaware that there could be any doubt about the traditional view[112]. To investigate in detail the way in which Craig's account of the Lombardic *breve testatum* came to be linked with his account of the history of the Scottish charter would greatly extend the scope of this paper, but it is worth noting the possibility that it originates in the epitomising in English of *Jus Feudale* in the second half of the seventeenth century[113]. A fairly large number of such epitomes survives[114]. They must have been very common indeed, as John Spottiswoode, a private teacher of law in Edinburgh, advised his class in Scots law that, among other works, for their vacation reading, they should 'gett ane Abridgement of Craig De ffeudis in write, ffor to read the Author Orriginally which is in latine, It being so long and tedious would Confuse you, and it were impossible to you to retain what you read'[115]. The majority of the surviving epitomes forms one group of manuscripts, the earliest member of which to be dated was written in 1673, though it may in its turn be copied from an earlier epitome[116]. In their abbreviation of Craig's title on the constitution of feus and proper and improper investiture, they each contain, with only trivial variation, the following passages:

> Lyke unto this among us are infeftments which are called propriis manibus when the superior with his own hands infefts his vassall except that in the former there was more solemnities used to witt the presence of the peers of the Court and the superior thereafter was holden to give his vassall (if he required the samen) a brieve testificatt called breve testatum which was in place both of the charter and seasine whereby he testified that he gave that infeftment.
>
> ...
>
> About these 500 years bygaine breve testatum which wee call a charter hath been in use to be received by the vassals from their superior and they were called brevia testata because of old the forms thereof were very short[117].

111. See Craig, *Jus Feudale*, 2.2.16; see text *supra* at notes 61-63.

112. D.M. Walker, *Principles of Scottish Private Law* (3rd ed. Oxford 1982 – 83), Vol. 3, p. 49 and note 1 thereon; J.M. Halliday, *Conveyancing Law and Practice in Scotland* (Edinburgh 1986), Vol. 2, pp. 94-95.

113. I am greatly indebted to my friend Hector MacQueen for the inspired suggestion of this possibility.

114. See National Library of Scotland, MS. 1950, MS. 5437, MS. 5438, MS. 9248, Adv. MS. 25.6.1, Adv. MS. 25.6.2, and Adv. MS. 28.3.14; Edinburgh University Library MS. La. III. 382, and MS. La. III 387; Signet Library, MS. 30:h; and Mitchell Library, MS. 115544 and MS. 187629.

115. National Library, MS. 3412, p. 479; MS. 3413, p. 386 is virtually identical.

116. Edinburgh University Library, MS. La. III. 387 has the date 3rd. November, 1673 on its title page. Not all the surviving MSS. are dated. National Library of Scotland, MS. 5437 and MS. 9248 and Edinburgh University Library, MS. La. III. 382 are, of the twelve MSS. so far located, the only ones not conforming to this type.

117. National Library of Scotland, Adv. MS. 25.6.2, ff. 25r-25v is the text given here

Whoever originally epitomised this part of *Jus Feudale* ignored the careful writing and nuances of Craig, and his errors were copied and accepted as correct by other young Scots learning the law. In the title on succession, where Craig specifically denied that the *breve testatum* had been received in Scotland, these epitomes merely note that brieves came to Scotland from England and thence from the Normans, ignoring Craig's argument[118].

One may suspect that the mistake still present in Professor Walker's *Principles* and recently perpetuated by Professor Halliday was thus born in the hasty work of a juvenile epitomiser in the later-seventeenth century. Certainly the error, whether from this or another source, went on to triumph in much of the more modern literature, and it probably was Lord Clyde's familiarity with this approach to the *breve testatum* in Scotland which led him into errors in translation. Craig accordingly could perhaps be faulted for writing in such a way as to be misconstrued. This would be unfair. The title of the work does, after all, indicate that it does not exclusively deal with Scots law. Indeed, one could go further and state that Craig's account of the relationship between Scots and feudal law in his discussion of infeftment exactly conforms with the aim he states in the dedication to the king. Furthermore, even his occasional use of the term *breve testatum* as a synonym for *charta* in Scotland is not unreasonable: there are indeed early Scots deeds described as *brevia*[119], and one should not put too much stress on specific terms and invest them with a significance they do not have, especially since Craig was happy to use *breve testatum* and *charta* in a loose fashion, while later explaining that the *breve testatum* had never existed in Scotland as a means of proving investiture. The *breve testatum* as a specialized type of early Scottish deed may be illusory, but Craig was not the illusionist[120].

(writing out in full common contractions). See also: National Library of Scotland, MS. 1950, f. 36v, MS. 5438, ff. 35v-36r, Adv. MS. 25.6.1, f. 41v, Adv. MS. 28.3.14, p. 33; Edinburgh University Library, MS. La. III. 387, pp. 59-60; Signet Library, MS. 30:h, pp. 60-61; Mitchell Library, MS. 115544, pp. 35-6, and MS. 187629, p. 34.

118. National Library of Scotland, MS. 1950, f. 96r, MS. 5438, f. 86v, Adv. MS. 25.6.1, ff. 106v-107r, Adv. MS. 25.6.2, f. 65v, Adv. MS. 28.3.14, p. 73; Edinburgh University Library, MS. La. III. 387, p. 164; Signet Library, MS. 30:h, p. 139; and Mitchell Library, MS. 115544, p. 83 and MS. 187629, p. 89.

119. See Barrow, *The Scots Charter*, pp. 152-5; and at p. 155 he writes: 'In the earlier decades of the twelfth century the words *breve*, a 'brief' or 'brieve', *anglice* a 'writ', and *carta* or *cartula*, a parchment containing formal business writing, seem to have been practically synonymous'. See also A.C. Lawrie, *Early Scottish Charters, Prior to A.D. 1153* (Glasgow 1905), pp. 23-5, nos. XXIX, XXX, and XXXII issued by Earl David in which there are these clauses: 'et sicut suum breve eam ad vestrum opus testatur'; 'sicut breve fratris mei praedicti eis testatur'; and 'si ipsi monachi haberent legales testes vel breve fratris mei'. It is not clear exactly what type of documents such *brevia* would have been (see Lawrie, *ibid.*, p. 271); but they clearly concern grants of titles. Note the caution of Donaldson, *Early Scottish Conveyancing*, p. 170: 'Investigation reveals that, while there is evidence that such a document [a *breve testatum*] was used on the continent, no example has ever been found in Scotland. That fact might not in itself be conclusive, for a precept, if followed by a charter, would be a somewhat fugitive writ, and it is noticeable that, while we have those charters, noted above, which allude to 'brieves', the brieves themselves have not survived'. (See Donaldson, *ibid.*, pp. 166-67.)

120. I am grateful to Professor R. Black, Dr. H.L. MacQueen, Professor R.K. Osgood, Mr. W.D.H. Sellar and Professor A. Watson for valuable comments on an earlier draft of this paper.